IN THE

Supreme Court Of The United States

OCTOBER TERM, 1975
NO. 75-938

AL C. HIGHTOWER ..... *Petitioner*

VS.

STATE OF ARKANSAS ..... *Respondent*

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS

BRIEF FOR RESPONDENT IN OPPOSITION

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STATUTE:

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OPINION BELOW

The opinion of the Arkansas Supreme Court is reported at 258 Ark. (Advanced Reports, No. 13) and is reproduced at page 7 of the Petition. Rehearing was denied October 6, 1975.

JURISDICTION

The jurisdiction requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Whether Ark. Stat. Ann. §41-303 is constitutional as applied to petitioner and, if so, whether petitioner has standing to challenge the constitutionality of that statute as applied to others.

STATUTE INVOLVED

Ark. Stat. Ann. §41-303 et seq. is set forth in the Petition at pp. 17-19.

STATEMENT

The petitioner, a layman, was convicted of performing an abortion in violation of Ark. Stat. Ann. §41-303 which statute prohibits the performance of abortions by those not licensed to practice medicine in the State of Arkansas.

The Arkansas Supreme Court, citing *May v. State*, 254 Ark. 194, 492 S.W. 2d 888 (1973), cert. den. 414 U.S. 1024, which raised the same issue raised herein, affirmed the conviction.

ARGUMENT

I.

THE DECISION OF THE ARKANSAS SUPREME COURT WAS CORRECT AND DID NOT VIOLATE ANY OF PETITIONER'S RIGHTS UNDER THE UNITED STATES CONSTITUTION.

Respondent submits that the decision of the Arkansas Supreme Court does not conflict in any way with any decision of this Court. Further, petitioner raised no substantial federal question and thus establishes no basis for the granting of certiorari.

The factual context is simple. Petitioner is a layman who was convicted of performing an abortion in violation of Ark. Stat. Ann. §41-303 which proscribes the performance of abortions by persons who are not licensed to practice medicine in the State of Arkansas. The Supreme Court of Arkansas in affirming the conviction and rejecting petitioner's argument that the statute under which he was convicted was unconstitutional, quoted from *May v. State*, 254 Ark. 194, 492 S.W. 2d 888 (1973) cert. den. 414 U.S. 1024:

> "The appellant has no standing to personally attack the constitutionality of §41-303 because it is not unconstitutional as applied to him. As applied to appellant, §41-303 simply prohibits a layman from performing or inducing an abortion."

Petitioner asserts that this decision of the Arkansas Supreme Court is ". . . contrary to the decision of *Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 and *Doe v. Bolton*, 410 U.S. 179, 93 S. Ct. 739, 35 L. Ed. 2d 201." However, petitioner does not indicate the specific nature of the conflict with the *Roe* and *Doe* decisions. Both *Roe* and *Doe* made it abundantly clear that a state has a sufficient interest in the health of its citizens to require that only licensed physicians perform abortions, just as the providing of other medical services is limited to such licensed physicians.

> "The State may define the term 'physician' as it has been employed in the preceding numbered paragraphs of this Part XI of this opinion, to mean only a physician currently licensed by the State, and may proscribe any abortion by a person who is not a physician as so defined." (*Roe*, supra, 410 U.S. at 165).

This Court in *Doe v. Bolton*, supra, while striking down portions of the Georgia abortion law (Ga. Criminal Code §§26-1201 — 26-1203) upheld the remaining provisions including §26-1201 which made it a violation to produce an abortion. The Arkansas statutory scheme, like the Georgia provision challenged in *Doe*, in its initial section, (Ark. Stat. Ann. §41-303), in language similar to that of the Georgia provision, makes it a violation for a person to induce an abortion and then, in subsequent sections (Ark. Stat. Ann. §§41-304 — 41-310), spells out the circumstances under which an abortion may be legally performed. Thus it is clear that even if certain portions of the Arkansas law may be subject to constitutional attack, the remainder of the law is valid and would support petitioner's conviction.

ARGUMENT

II.

PETITIONER LACKS STANDING TO CHALLENGE THE CONSTITUTIONALITY OF THE ARKANSAS ABORTION STATUTES.

Petitioner alleges that the Arkansas statutory scheme prevents women in Arkansas from procuring abortions in hospitals and clinics. However, petitioner does not indicate how the application of the statutes to him operates to prevent women from having abortions performed by doctors licensed to practice medicine in this state.

Respondent argues that since the Arkansas abortion statute is not unconstitutional as applied to petitioner, petitioner has no standing to assert possible unconstitutionality with respect to others.

It is clear that:

> ". . . one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional." (Citations omitted). *U.S. v. Raines*, et al, 362 U.S. 17, 21, 4 L. Ed. 2d 524, 529 (1960).

It has been held that a licensed physician has standing to litigate on behalf of his patients who have been deprived of their constitutionally protected right to obtain an abortion but this is so because the physician's right to practice medicine free from the imposition of arbitrary restraints is inextricably bound up with the privacy rights of patients who seek an abortion. *Greco v. Orange Memorial Hospital Corporation*, 513 Fed. 2d 873 (5th Circuit 1975); *Nyberg v. City of Virginia*, 495 Fed. 2d 1342 (8th Circuit 1974). Petitioner, a layman, has no such connection with those women who seek to have an abortion for under no circumstances would petitioner have the right to render such medical services.

The petitioner cites *State v. Hultgren*, 204 N.W. 2d 197 (Minn. 1973) and several other cases in support of the general proposition that laymen convicted of performing abortions have standing to challenge the constitutionality of State abortion statutes. In *Hultgren* the Supreme Court of Minnesota held that the Minnesota abortion statute was invalid *in its entirety* in the light of the holding in *Roe*, saying:

> "Since §617.18 *makes no distinction* between abortions performed by physicians and those performed by laymen, as presently drafted it is unenforceable against this defendant . . ." (emphasis added)

The Court noted further that:

". . . a statute forbidding unlicensed laymen from such activity is not only proper but desirable." (204 N.W. 2d at 198)

The remaining cases cited by petitioner are likewise easily distinguishable from the instant case, and fall into two basic classes.

The first class includes situations similar to that in *Hultgren* where the conviction of a layman was reversed because the State abortion statute failed to distinguish between physicians and laymen and was therefore held invalid *in toto* in the light of *Roe* and *Doe*. *People v. Frey and Mirmelli*, 294 N.E. 2d 257 (Ill. 1973); *People v. Bell*, 294 N.E. 2d 711 (Ill. 1973); *Commonwealth v. Page*, 303 A. 2d 215 (Pa. 1973).

The cases in the second category are concerned with licensed physicians whose actions were found on appeal to be constitutionally protected under the holdings in *Roe* and *Doe*. *State v. Hodgson*, 204 N.W. 2d 199 (Minn. 1973); *State v. Munson*, 206 N.W. 2d 434 (S.D. 1973); *State v. Strance*, 506 P. 2d 1217 (N.M. 1973).

The Court in the *Strance* case held that while the portions of the New Mexico abortion statute which applied to Dr. Strance were unconstitutional in light of *Roe* and *Doe*, this decision would have no effect on the section of the statute which prohibited the performance of abortions by laymen.

Respondent submits that the *Strance* case is the only case cited by petitioner which is helpful to the resolution of the issue before this Court and that the holding there supports the position of respondent.

On the basis of the foregoing, respondent argues that petitioner's reliance on his authority is misplaced and that he has no standing to challenge the constitutionality of the Arkansas abortion statute, which statute is clearly constitutional as applied to petitioner. Further that the decision below is clearly correct and that no substantial federal question has been raised to establish the basis for the granting of certiorari.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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